

Furthermore, the Commission was well-aware of the context of its statement and was equally well-aware that the context included maintaining the off-network prohibition. As the Commission stated:

[W]e conclude that it is definitely in the public interest to encourage the development of a body of new (not repeat) programs outside the network process, and thus provide opportunity for the development of new program approaches and ideas.⁴⁹

Nowhere did the Commission even begin to suggest that completely unbridled licensee discretion during the prime access hour was a goal or purpose which would overshadow the Commission's basic concern to open prime time to new, non-network programming. Channel 41's arguments, therefore, are, indeed, superficial and groundless.

IV. THE NETWORK SPECIAL STAFF REPORT PROVIDES NO COMPELLING REASON TO RE-EXAMINE EITHER THE PRIME TIME ACCESS RULE OR THE OFF-NETWORK PROHIBITION.

Channel 41 wrongly faults the Commission for failing to address the off-network prohibition in the wake of the Network Inquiry *Special Staff Report* in 1980.⁵⁰ Channel 41 relies on findings in the *Special Staff Report* that "the [off-network] ban and the entire PTAR merely 'provided incentives to copy existing inexpensive network programs.'"⁵¹ According to Channel 41,

⁴⁹ 1975 *Report and Order*, 50 FCC 2d at 836.

⁵⁰ Channel 41 Petition at 8-9.

⁵¹ *Id.* at 9, citing Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* at 417 (1980) [hereinafter cited as *Special Staff Report*].

game shows have become the "heart of non-network, prime time schedules."⁵² Also, they argue that the only benefits of the Prime Time Access Rule flowed to an already "successful financially" first-run syndication industry.⁵³ Therefore, Channel 41 argues, "Despite the strength of those findings, the Commission has refused to act on them."⁵⁴

Neither of these findings is at all compelling. The first represents the type of program judgments the Commission wisely eschewed in adopting the rule. The second assumes wrongly that the goal of the rule was to strengthen the financial position of the first-run syndication industry and ignores the true goal of the rule to provide first-run producers access to prime time so as to enhance diversity and reduce network domination of prime time. The Commission stated ever so clearly in adopting the rule:

We emphasize again that it is not our objective or intention to smooth the path for existing syndicators or promote the production of any particular type of program -- whether or not it be included within the present category of quality high-cost programs. The types and cost levels of programming which will develop from opening up evening time must be the result of the competition which will develop among present and potential producers seeking to sell programs to broadcasters and advertisers.⁵⁵

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 1970 *Report and Order*, 23 FCC 2d at 397.

Similarly, as then Commissioner Kenneth A. Cox noted in his concurring statement:

I have no illusions that, in the process, we are going to get better programming. I recognize that the economic motives of the local affiliates are the same as those of the networks. I simply hope that we will get somewhat more varied programming, with more people involved in the creative process, and without forcing everything through the network funnel.⁵⁶

In 1975, when confronted with the same argument about presentation of games shows in prime access, the Commission pointed out that:

Perhaps more fundamental is the question of to what extent repeal or really substantial abridgement of the rule would be justified on the basis of a Commission evaluation of such matters. Action on a basis like this has the danger of reflecting the Commission's personal predilections and prejudices. A related question is, assuming such an inquiry is appropriate, what standard should be used, and whether they should be applied in a sense, retroactively and without any public input into their formulation. For example, assuming that 65.6% of access entertainment time devoted to game shows is undesirable, what about 41.2% of network prime time devoted to crime-drama shows of various types? If we look at the concentration of game shows in certain markets such as Cincinnati or Albany, must we not look also at three network crime-drama shows opposite each other on Wednesday at 10 p.m.? ⁵⁷

In short, the Commission rightly has kept program tastes and quality out of the equation. Thus, the *Special Staff Report's* findings regarding the nature of programming shown during prime access are immaterial. The Commission,

⁵⁶ 1970 *Report and Order*, 23 FCC 2d at 418 (Concurring Statement of Commissioner Kenneth A. Cox).

⁵⁷ 1975 *Report and Order*, 50 FCC 2d at 838.

therefore, hardly may be taken to task for refusing to consider changes in a rule on the basis of the *Special Staff Report's* findings.

V. CHANGES IN THE VIDEO MARKETPLACE ONLY CONFIRM THE NEED FOR MAINTAINING THE PRIME TIME ACCESS RULE AND THE OFF-NETWORK PROHIBITION.

A. Their Arguments Reflect Only a Myopic Concern About Their Own Inability to Show Off-network Programming in Prime Access.

Channel 41 and Hubbard argue ineffectually that the off-network prohibition no longer is necessary in light of changes in the video marketplace. Their specific arguments amount to little more than a complaint that affiliates may not use off-network programming during access time, while competing independent stations may. First, Channel 41 points to the growth in the number of independent stations since the Prime Time Access Rule was adopted, thereby creating "anti-competitive results." These allegedly anti-competitive results, according to Channel 41 are exacerbated by the cable carriage of independent superstations, which also may show off-network programming during prime access.⁵⁸ The consequences of the off-network prohibition then are increased prices for both off-network and first-run syndicated programming and the inability of affiliates to use off-network programming at other times as well as prime access.⁵⁹

⁵⁸ Channel 41 Petition at 18-20.

⁵⁹ *Id.* at 20.

Hubbard claims that the off-network prohibition no longer is necessary to "lessen network dominance."⁶⁰ Hubbard then launches into the litany of market changes familiar to all and concludes, "There is no question that today's video marketplace in no way resembles the competitive environment that existed in 1970 or even 1975."⁶¹ Therefore, according to Hubbard, "There is no demonstrated or perceived rationale for retaining the off-network restriction given the realities of today's changing video marketplace."⁶² None of their arguments is sound.

The basic answer to their plaintive whine is, "so, what?" The first-run programming shown by network affiliates is highly competitive with the off-network programming shown by independents. According to an INTV analysis of Arbitron ratings, first-run programming shown on UHF affiliates in the top 50 markets during prime access in November, 1992, had an average rating of 7.4, while off-network programming shown on UHF independents in the top 50 markets during prime access in November, 1992, had an average rating of 4.9.⁶³ In other words, UHF affiliates enjoyed a 51% ratings advantage

⁶⁰ Hubbard Petition at 13, 17.

⁶¹ Hubbard Petition at 14.

⁶² Hubbard Petition at 15-16.

⁶³ See Exhibit 2, attached hereto.

over similarly situated UHF independents. This hardly is the stuff of anticompetitive injury.⁶⁴

Channel 41's complaint about the effects on syndicated program prices also is specious. Channel 41 refers to the statement in the *Special Staff Report* that:

The consequence of restricting the suppliers from whom an affiliate can purchase a program and giving independent stations a competitive edge in program choices is almost necessarily to increase the prices for both first-run and off-network programs.⁶⁵

In context, however, the statement actually confirms that the rule is working much as anticipated. Immediately preceding the cited statement from the *Special Staff Report* is the following discourse on the impact of the Prime Time Access Rule on syndicated program prices:

In addition, the Commission likely has affected the prices for syndicated programs by promulgating the access rule. The rule obviously increased the demand for first-run programs by creating an early evening period of at least one-half hour each day during the week when affiliated stations in the top fifty markets have no alternative but to exhibit first-run or locally produced programs. Similarly, the rule has authorized independent stations to be the exclusive sources of off-network programs in the top 50 markets during the access period, thereby

⁶⁴INTV also must note that the financial performance of affiliates continues to outpace independent stations. In 1992, the median independent showed a profit of \$54,500.00, while the median affiliate showed a profit of \$ 1,082,593.00. 1993 *NAB Television Financial Report*. INTV does recognize that WOTV (*nee* WUHQ-TV) is one of a very few UHF affiliates which are duplicate affiliates or fourth affiliates in the top 50 markets and, thus, faces a particularly challenging competitive situation. However, the station obviously has survived, if not prospered. Furthermore, the station began operation on July 24, 1971, and the licensee certainly was aware that the Prime Time Access Rule would affect its operations prior to commencing station operation.

⁶⁵Channel 41 Petition at 19-20, citing *Special Staff Report* at 425-426.

enabling these stations to obtain larger market shares during this time than they otherwise would have.⁶⁶

With respect to first-run programming, the Prime Time Access Rule was designed as a catalyst to production of prime time first-run syndicated programming. Of course, it created greater demand for such programming. An increase in demand would be expected to lead to increased prices. Now, however, the demand for first-run programming in prime access is constant, and the market for first-run access programming is competitive.⁶⁷ Multiple first-run producers and syndicators compete in selling their programs to

⁶⁶ *Special Staff Report* at 425.

⁶⁷ These are distinctive markets in some respects. As recognized by the Network Inquiry Special Staff:

Advertisers, syndicators, and program producers all agree that the 7:00 to 8:00 time period is difficult to program successfully. The size and characteristics of the audience during that hour differ significantly from a typical prime-time audience in that fewer adults, especially in the key group of women 18 to 49, are watching and far more children in the audience. Thus, stations are faced with the prospect of selling an audience to advertisers that both is smaller in absolute size and has fewer of the most desirable viewers than one typically encounters in prime time.

Network Inquiry Special Staff, *An Analysis of Television Program Production, Acquisition and Distribution* (October 1980) at 417-418 [hereinafter cited as *Special Staff Analysis*].

multiple buyers in the top 50 markets.⁶⁸ In short, the rule has produced the desired and anticipated result.

With respect to off-network programming, independents' ability to use off-network programming during prime access has strengthened independent television markedly. This has enabled independents to pay substantial prices for popular off-network programs, but this has no direct effect on Channel 41.⁶⁹ Moreover, Channel 41's recitation of the *Special Staff Report's* conclusions completely ignores the anticipatable effect of eliminating the off-network prohibition. Repeal of the off-network prohibition would increase the number of buyers for off-network programming. Moreover, the new buyers, network affiliates, are stronger, richer buyers. Thus, demand would increase. At the same time, the supply of off-network programming would

⁶⁸In this regard, the Program Producers and Distributors Committee has pointed out to the Commission:

Prior to 1970, the first run syndication marketplace was minuscule, and prime time first-run programs were non-existent. In contrast, in 1990, there were "well over 100 separate competing distributors of syndicated programs offering almost 250 first-run and almost 170 off-network programs to local stations." The number of syndicated program distributors increased by 50% from 1982 to 1990. As a result, local independent and affiliated television stations have far more programming options today than in the past. Affiliates are not limited to network programs, and all stations have access to a vast array of original non-network syndicated programs from which to choose. This vigorously competitive first-run television programming marketplace did not exist prior to 1970.

Comments of the Program Producers and Distributors Committee in Response to Second Further Notice of Proposed Rulemaking, MM Docket No. 90-162 (filed February 1, 1993) at 3-4.

⁶⁹If anything, it is beneficial indirectly because higher anticipated syndication revenues allow a program producer to charge a network lower network license fees. See Comments of CBS, Inc., MM Docket No. 91-221, *supra*, at 59.

remain relatively constant.⁷⁰ Consequently, prices for off-network programming would increase.⁷¹ In light of Channel 41's apparent concern about price increases for syndicated programming, it doubtfully would consider an increase in off-network program license fees beneficial to its own interests.

Channel 41 also bemoans the alleged inability of affiliates to afford to acquire and exhibit off-network programming for broadcast outside of prime time.⁷² In reality, however, affiliates often acquire popular (and expensive) off-network series for use in other dayparts. The *Special Staff Report* found, for example, that:

Affiliates also buy the rights to [off-network] programs for exhibition primarily during the late afternoon (4:00 to 5:00 or 6:00 P.M.) and early morning (9:00 to 10:00 or 11:00 A.M.)⁷³

⁷⁰The supply of off-network programming is not a function of demand, but a function of the number of network series which succeed on the network, thereby stimulating production of enough episodes to be viable in syndication. See *Special Staff Report* at 411. Moreover, the supply of highly-popular half-hour off-network series, the staple of prime access on independents, always is very small. See Remand Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed February 1, 1993) at 17 & Exhibit 1; Remand Reply Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed February 16, 1993) at 4 & Exhibit 2.

⁷¹Hubbard in its petition alludes to comments filed by CBS, Inc., in a related proceeding, which state that "affiliates would pay more for such programs if they could be run in the access period." Hubbard Petition at 11, citing Comments of CBS, Inc., MM Docket No. 91-221 (filed November 21, 1991).

⁷²Channel 41 Petition at 20.

⁷³*Special Staff Report* at 429; see also *Special Staff Analysis* at 428, n.131 ("Affiliates often exhibit off-network programs during the early part of this fringe time (e.g., 5:00 - 6:00 P.M.).").

Indeed, as illustrated by the affiliate response to the syndication of *Seinfeld*, affiliate interest in off-network programming is very real.⁷⁴

Hubbard also decries the off-network prohibition curb on licensee discretion as inconsistent with the objectives of the Prime Time Access Rule.⁷⁵ Hubbard cites the *Special Staff Report* for the proposition that the Prime Time Access Rule has "reduced the extent to which the system achieves the goal of localism."⁷⁶ Hubbard -- and the *Special Staff Report* -- leave unexplained how permitting a network affiliate to show an off-network program now shown in the market on an independent station would contribute to localism. An off-network program hardly is a local program. Whether the independent or the affiliate determines to show the program, the decision to show it has been made locally.

Hubbard also complains that the off-network prohibition "restricts and impedes the local stations affiliated with the networks from competing in their local markets."⁷⁷ Indeed, Hubbard alleges that, "There is abundant evidence...that it is crippling local stations affiliated with a national network

⁷⁴ See Section II, *supra*, at 18 -19.

⁷⁵ Hubbard Petition at 19-21.

⁷⁶ Hubbard Petition at 20, *citing Special Staff Report* at 512.

⁷⁷ Hubbard Petition at 4.

in the top 50 markets.”⁷⁸ Hubbard, too, however, views the situation only from its own self-oriented perspective. It asserts that affiliates, already beset by “increasing competition and declining revenues,” have diminished capability “to compete with independents for the most popular programming.”⁷⁹ Then cloaking its argument in the mantle of the public interest, Hubbard posits that the viewing public would suffer “since [sic] it is the local network affiliates who provide the bulk of locally-produced news and public affairs programs.” Hubbard ultimately warns that “declining revenues that force local stations to cut back on costs affect the quantity and quality of local news and public affairs programming available to the public more when network affiliates face such cutbacks than when independents face cost cuts.”⁸⁰

This line of argument lacks foundation. First, Hubbard offers no evidence that either Hubbard or any other affiliate has cut back on new or public affairs programming.

Second, affiliates undoubtedly do face more competition from independent stations and cable television, but independents face the same increasing competition from cable and, unlike their affiliate competitors, had

⁷⁸ Hubbard Petition at 22.

⁷⁹ Hubbard Petition at 4.

⁸⁰ Hubbard Petition at 22, citing Setzer, Florence, and Levy, Jonathan, *Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy (June, 1991), 6 FCC Rcd 3996, 4087-4088 (1991) [hereinafter cited as *OPP*].

to enter and strive for a foothold in local television markets already served by entrenched and well-heeled network-affiliated stations. Furthermore, independents also entered the market without the benefit of a network program source or a VHF channel. Concerns about increased competition, therefore, are far from the exclusive domain of network affiliates.

Third, whether affiliates' revenues are increasing or declining, they continue to perform better than similarly situated independent stations.

Finally, of course, as the Commission acknowledged in adopting the rule:

In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anticompetitive" where the market is being opened through a limitation upon supply by three dominant companies.⁸¹

Similarly, in 1975, the Commission explained:

While the off-network aspects of the rule do constitute a restraint which is not directly related to present network dominance, the drastic impact on our objective of encouraging the development of new material would obviously be completely disserved. While there are some results which might be considered anomalous..., this is doubtless true in the short run of any regulation which imposes restrictions looking toward longer-term benefits.⁸²

As the Commission recognized, determining the public interest benefit of a rule involves far more than weighing only the immediate cost or benefit to

⁸¹ 1970 *Report and Order*, 23 FCC 2d at 395.

⁸² 1975 *Report and Order*, 50 FCC 2d at 848.

any particular party. Channel 41 would have the Commission restrict its focus to the alleged cost of the rule to network affiliated stations.

B. Petitioners' Desire to Repeal Only the Off-Network Prohibition Reveals Their Myopic, Self-interested Focus.

In reality, of course, repeal of the off-network prohibition would make sense only if the Prime Time Access Rule itself were found unnecessary. Channel 41 itself admits that the off-network prohibition rests on the same rationale as the basic Prime Time Access Rule.⁸³ Again, the objective of the off-network prohibition, as well as that of the Prime Time Access Rule, is to open a portion of prime time to new, non-network programming. Assuming, as one must in light of Channel 41's quest for elimination of the off-network prohibition, that affiliates would use off-network programming in prime access, elimination of the off-network prohibition would undermine the Prime Time Access Rule completely. Therefore, to raise any valid question about the off-network prohibition, one must raise basic questions about the underlying Prime Time Access Rule itself.

Channel 41 and Hubbard pretend this is not so, raising no question about the underlying Prime Time Access Rule itself. One might suspect that they consider the Prime Time Access Rule advantageous to their own interests. Network affiliates have turned the access period to their advantage through use of non-network programming. The Prime Time Access Rule

⁸³ Channel 41 Petition at 6.

protects affiliates from the prospect of their networks furnishing network programming during all four hours of prime time. Therefore, they are understandably reluctant to urge repeal of the Prime Time Access Rule itself. Moreover, it underscores that their focus is their own interest rather than the public interest.

C. The Prime Time Access Rule Has Been Vital to the Development of Independent Television as Emerging Competition for the Established Networks and Their Affiliates.

Channel 41's myopic approach leaves it studiously ignoring the other elements of the rationale and other demonstrable benefits of the Prime Time Access Rule. Hubbard's arguments also sidestep obvious beneficial effects of the off-network prohibition, which would be lost if it were eliminated or the Prime Time Access Rule repealed. First, for example, in adopting the Prime Time Access Rule in 1970, the Commission stated:

We believe this modest action will provide a healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed, affiliated) stations. The entire development of UHF should be benefitted.⁸⁴

Second, growth of independent television, the Commission hoped, would create a stronger market for original prime time first-run syndicated program production.⁸⁵ Third, the Commission hoped to provide a base for additional

⁸⁴ 1970 *Report and Order*, 23 FCC 2d at 395.

⁸⁵ 1970 *Report and Order*, 23 FCC 2d at 394. The Commission also noted that:

With the expanded syndication market as a feasible alternate to network exhibition [a producer's] bargaining position will be improved and he can be

networks. Fourth, the Commission hoped that more locally-produced or locally-responsive programming would be made available.

The Prime Time Access Rule has been an especially dramatic success in promoting the realization of the Commission's goals by fostering growth and development of independent television.⁸⁶ The "off-network" programming block in early fringe/prime access has become the "franchise" for independent stations. This was apparent very early on in the life of the rule. In 1974, INTV among others raised the concern that relaxation of the rule would hurt independent stations, which would lose "the exclusive right to show off-network material in access time...."⁸⁷ Off-network programming has been and remains a uniquely viable programming *genre* in independent stations' struggle to compete with established network competitors. As pointed out by the Special Staff:

Independent stations have been able to garner a substantial share of the added revenues as they have demonstrated an ability to compete successfully with affiliates during certain periods of the broadcast day, especially between approximately 5:00 and 8:00 P.M. E.S.T. Independent station programmers often refer to this period as their prime time and schedule their most popular, and

expected to develop into a stable and continuing alternate source of programs and ultimately compete for network time.

Id. at 398.

⁸⁶ See Frazier, Gross & Kadlec, Inc., *Independent Thinking, An Overview of the Independent Television Industry* (1986) at 7-4 [hereinafter cited as *Independent Television*] ("The rule has worked to the benefit of local stations, particularly independents.").

⁸⁷ *Report and Order*, 44 FCC 2d 1081, 1114 (1974).

expensive, off-network programs during these hours. These stations view this as counter programming to offer viewers an alternative to local and national news and first-run syndicated programs usually telecast by affiliates during the same period. A key ingredient in this strategy is the Commission's Prime Time Access Rule which not only prohibits affiliates in the top 50 markets from clearing network offerings between 7:00 and 8:00 P.M., except for news and certain other program types, but also bans their exhibition of off-network programs.⁸⁸

The significance of off-network programming to independents was underscored again in a study commissioned by INTV in 1986:

[O]ff-network...half hours still command premium prices. These half-hours are destined for the key fringe/prime access dayparts and constitute an important revenue time period for independents. Early-fringe and prime access dayparts can contribute up to one-half of an Independent's total revenue. It is critically important for the Independent to acquire competitive programming in these time periods, and station management is paying a premium for that programming.⁸⁹

Independent reliance on off-network programming during early fringe/prime access remains the case today. As the Commission recently found in its proceeding involving the network financial interest and syndication rules:

The record clearly establishes that off-network hits draw successful ratings for independent stations during early fringe hours, which is the single greatest revenue producing period for these stations. We also find support in the record for the idea

⁸⁸ *Special Staff Analysis* at 428.

⁸⁹ *Independent Television* at 6-4. The need for independent stations to engage in counter programming strategies also was described in *Independent Television. Independent Television* at 6-1.

that independent stations would be harmed if they could not obtain hit off-network shows.⁹⁰

The Commission based its finding on substantial evidence submitted by INTV, all of which is pertinent to evaluation of the Prime Time Access Rule.⁹¹ Notably, the Commission also has found that first-run programming would provide no substitute for the highly-popular off-network programs which anchor independent station program schedules:

We also accept the Independent Stations' contention that because of the high cost of first-run programming and the fact that first-run shows cannot be "stripped" (i.e., stations cannot run multiple episodes a week as they can with reruns), first-run material is not a viable alternative to the ratings appeal of popular off-network hits.⁹²

⁹⁰ *Memorandum Opinion and Order*, 8 FCC Rcd 8270, 8294, n.64 (1993), *pet. for rev. pending sub nom. Capital Cities/ABC, Inc., v. FCC*, No. 93-3458 *et al.* (7th. Cir., filed May 24, 1993)[citations omitted] [hereinafter cited as 1993 *Finsyn Reconsideration*].

⁹¹ See, e.g., the following:

- *INTV's Proposal for Modification of the Network Financial Interest and Syndication Rules*, pages 6-15 (submitted originally as Exhibit 1 to the Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed November 21, 1990)).
- *The Importance of Attractive Syndicated Programming to Independent Television Station Programming Strategies: A Rejoinder to the Networks* (submitted originally as Exhibit 2 to the Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed November 21, 1990)).
- Remand Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed February 1, 1993), Exhibit 1.
- Remand Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed February 1, 1993), Exhibit 2.
- *A Quick Analysis of Early Fringe/Prime Access Programming* (submitted originally as Exhibit 2 to the Remand Reply Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed February 16, 1993)).

⁹² 1993 *Finsyn Reconsideration*, 8 FCC Rcd at 8294, n.64.

This FCC finding is also firmly supported. Even CBS, a proponent of repeal of the financial interest and syndication rules and the off-network prohibition has acknowledged the unique virtues of off-network programming:

Off-network programs generally are television's vintage best -- the expensively produced programs that, as first-run network series, were able to achieve a level of popularity sufficient to permit their survival for numerous seasons of network exhibition. By contrast, first-run syndicated programming is less expensively produced and is generally brought onto a market without the benefit of an established public following. Therefore, it is not surprising that off-network programming newly introduced to syndication generally attracts far larger audiences than first-run programming entering the syndication market for the first time.⁹³

Thus, independent stations' exclusive use of off-network programming in prime access has been a key element in the growing strength of independent television.

The improved financial posture of independent stations has contributed significantly to realization of the goals of the Prime Time Access

⁹³ Comments of CBS, Inc., MM Docket No. 91-221 (filed November 21, 1991) at 57-58; *see also Special Staff Analysis* at 410 ("The most important characteristic common to all off-network syndicated programs is a successful run in network prime time. Success as a network series is essential for two reasons. First, without a longer than average network run, the series will not provide enough episodes to be saleable in domestic syndication. Second, network prime time popularity serves as a surrogate measure of a series' likely success as a syndicated program."); *Independent Television* at 6-3 ("With the exception of off-network programs, which at least have a rating track record, the other program development opportunities represent real risk.").

Rule.⁹⁴ First, independent television has grown substantially since 1970.⁹⁵ This has enhanced outlet diversity and promoted fuller use of UHF channels.⁹⁶ Second, the growing independent television industry now is emerging as a market for prime-time first-run syndicated production. Third, a fourth network, Fox, has emerged over the past seven years, and two other networks are set to launch within the next year. Fourth, more independent stations have begun to offer local news.⁹⁷

In short, the Commission for the first time is beginning to see a realization of the benefits of the Prime Time Access Rule. These benefits have not come exactly as expected by the Commission, but they are undeniable. The

⁹⁴The link between financial vitality and service is unassailable. 1993 *Finsyn Reconsideration*, 8 FCC Rcd at 8294, n.64.

⁹⁵Nonetheless, independent stations still remain weaker on average their affiliate competitors and the Commission's Office of Plans and Policy considers independent particularly vulnerable to the ongoing changes in the video marketplace. See *OPP* at 15, 38, 46.

⁹⁶Nonetheless, many UHF channels remain vacant. The Commission's latest TV Channel Utilization Report indicates that 224 commercial UHF channels are vacant. *Television Channel Utilization* (released March 10, 1994).

⁹⁷Notably, the Special Staff and the Commission's Office of Plans and Policy have been proven incorrect in their assertions to the contrary. *Special Staff Report* at 512 ("The question remains whether by compelling affiliates to do their own programming during the access period, the rule fostered the Commission's goal of localism. The general answer appears to be that it did not."); *OPP* at 31, n.27 ("Independent stations also provide some local programming, including news, but viewing shares of this programming cannot be disaggregated. However, as we shall see below, independents as groups provide much less of such programming than do affiliates."). See, *contra*, INTV Staff, A "Mini-Critique" of the *OPP Paper*, submitted as Exhibit 2 to the Comments of the Association of Independent Television Stations, Inc., MM Docket No. 91-221 (filed November 21, 1991), Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-4 (filed September 25, 1991) at 32-33 & Exhibit A. Of course, whereas the Commission may have hoped for more local programming during prime access on affiliates, the Prime Time Access Rule has contributed to the growth of local programming, including news, on affiliates.

Commission originally did not envision the boost to independent television provided by the Prime Time Access Rule.

Petitioners simply ignore these pronounced benefits of the Prime Time Access Rule and the off-network prohibition in arguing for repeal of the off-network prohibition. They straitjacket their assault on the off-network prohibition in the mindset of the 1970s and the myopia of their position is rooted solely in their immediate self-interest. Thus, whereas the video marketplace has changed, the most compelling factor *vis-a-vis* the Prime Time Access Rule has been the growth and development of independent television and the many public benefits it has spawned.

Ultimately, therefore, Channel 41's and Hubbard's positions are deficient of merit and provide no basis for revisiting either the off-network prohibition or the Prime Time Access Rule.

VI. PETITIONERS RAISE NO VALID QUESTION ABOUT THE CONSTITUTIONALITY OF THE PRIME TIME ACCESS RULE.

First Media, Channel 41, and Hubbard also challenge the Prime Time Access Rule and the off-network prohibition on constitutional grounds. Their arguments rest on two demonstrably faulty premises. First, they argue essentially that *Red Lion* no longer is good law. In the absence of *Red Lion* and the scarcity rationale, they argue, the Prime Time Access Rule and off-network prohibition would be subject to much more demanding scrutiny

under present First Amendment jurisprudence.⁹⁸ Second, they have concluded in their own ways that the Prime Time Access Rule and/or off-network prohibition have become pointless and unjustifiable. Consequently, they argue that the Prime Time Access Rule and off-network prohibition would fail to withstand even minimal scrutiny.⁹⁹ Neither of petitioners' premises are valid.

At the outset, INTV reminds the Commission that petitioners inscribe their arguments on no *tabula rasa*. The constitutionality of the Prime Time Access Rule is no matter of first impression. The Prime Time Access Rule was upheld in the face of First Amendment challenge shortly after it was adopted. *Mt Mansfield Television, Inc.*, 442 F.2d 470 (2d. Cir.1971). More recent claims that rules closely related to the Prime Time Access Rule violate the First Amendment also have been summarily rejected. At the same time it adopted the Prime Time Access Rule, the FCC adopted the network financial interest and syndication rules. Those rules generally prohibited the networks from holding financial interests in or syndicating television programming. *Network Television Broadcasting*, 23 FCC 2d 382 (1970), *aff'd on*

⁹⁸First Media Petition at 7 *et seq.*; Hubbard Petition at 23-26.

⁹⁹Channel 41 Petition at 21-23; Hubbard Petition at 26-28.

reconsideration, 25 FCC 2d 318 (1970), *aff'd*, *Mount Mansfield Television, Inc.*, 442 F.2d 470 (2d. Cir.1971).¹⁰⁰

In 1991, the FCC modified the financial interest and syndication rules.¹⁰¹ In the course of that proceeding, opponents of the revised rules claimed that they, too, violated the First Amendment. However, in *Schurz v. FCC*, 982 F.2d 1043, 1049 (7th. Cir. 1992), the United States Court of Appeals for the Seventh Circuit responded to those claims by observing that:

[A]lthough as an original matter one might doubt that the First Amendment authorized the government to regulate so important a part of the marketplace in ideas and opinions as television broadcasting, the Supreme Court has consistently taken a different view. *FCC v. National Citizens Committee for Broadcasting*, *supra*; *FCC v. Pacifica Foundation*, 438 U.S. 726, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978); *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 226-27.

Thus, petitioners face a high hurdle in urging now that the Prime Time Access Rule and off-network prohibition are unconstitutional.

In attempting to leap that hurdle, they fall flat on their faces. First, petitioners' fail to support their position that *Red Lion* has disappeared from the annals of good law. Their reliance on the Commission's decision in

¹⁰⁰The relationship of the three rules was recognized by the court in *Mount Mansfield*, *supra*, 442 F.2d at 476:

In conjunction with [the Prime Time Access Rule], the Commission adopted the financial interest and syndication rules along the lines proposed in the original 1965 notice, essentially to prevent indirect circumvention of the prime time access rule, and to encourage the "development of diverse and antagonistic sources of program service."

¹⁰¹The revised rules included a provision prohibiting networks from scheduling network-produced programming during more than 40% of their prime time.

Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F. 2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990), is utterly misplaced. As this court expressly recognized in reviewing the FCC's decision in *Syracuse Peace Council*, "The FCC's decision that the fairness doctrine no longer serves the public interest is a *policy judgment*." *Syracuse Peace Council v. FCC*, *supra*, 867 F. 2d at 660 [emphasis supplied]. The constitutional analysis applied by the FCC, therefore, is *dicta*. Indeed, it was not even addressed by the court.¹⁰²

Even if the court had addressed the constitutional issue, it would have fallen short of upholding a determination that the underlying "scarcity" rationale of *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969) had been eclipsed by the evolution of communications technology and services. As the court noted in *Syracuse Peace Council v. FCC*, *supra*, 867 F. 2d at 659, the FCC in its constitutional analysis had concluded that the fairness doctrine violated the constitution "even under *Red Lion's* view of the permissible scope of government control of broadcasters...." Thus, the constitutional element of the FCC's decision required no determination that *Red Lion* had been undermined.¹⁰³ Furthermore, whatever the FCC might have said about

¹⁰²As the court observed, agencies may not "maneuver a court into a constitutional decision simply by vaulting over its statutory mandate to define and pursue the public interest." *Syracuse Peace Council*, *supra*, 867 F. 2d at 659.

¹⁰³Notably, accepting Petitioner's view that *Red Lion* has been undermined would call into question the constitutionality of all broadcast programming regulation.

the matter, *Red Lion* subsequently was cited with approval in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-67 (1990). Therefore, no basis is provided by petitioners for the Commission to seize on the purported demise of *Red Lion* as grounds for concluding the Prime Time Access Rule or off-network prohibition unconstitutional.¹⁰⁴

Second, they base their conclusion that the off-network prohibition is unconstitutional under traditional First Amendment doctrine applicable to all media on the faulty premise that the rule is without justification. Channel 41 asserts that the goal of the off-network prohibition (and, by the same token, the Prime Time Access Rule in its entirety) has been achieved and that “the government has offered no new rationale that withstands even minimal scrutiny.”¹⁰⁵ Similarly, Hubbard submits that “the underlying facts that induced the Commission to enact the off-network ban and any conceivable justification for the ban no longer exist.”¹⁰⁶ However, as demonstrated above, the rules are amply justified not only by their

¹⁰⁴First Media’s approach is especially flawed. It has sought to short-circuit sound agency decision making via a declaratory ruling that because the law allegedly has changed, the Prime Time Access Rule *ipso facto* is unconstitutional. This approach, however, is deficient. Under any level of scrutiny under the First Amendment, the policy rationale and factual predicates of a rule must be examined. As the court noted in *Syracuse Peace Council v. FCC*, *supra*, 867 F. 2d at 659, “an ultimate constitutional decision on the doctrine necessarily melds raw facts with First Amendment value judgments....” An FCC decision devoid of factual or policy predicates, written in “purely constitutional terms” would only invite the inevitable remand of its decision. *Id.*

¹⁰⁵Channel 41 Petition at 22-23.

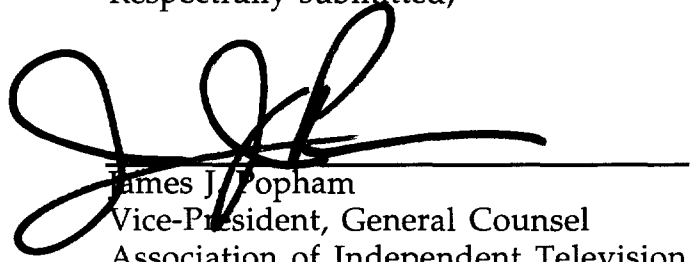
¹⁰⁶Hubbard Petition at 28.

underlying purposes to promote diversity and localism, but also by the outstanding record of success enjoyed by the rule in that respect. This is a far cry from *Home Box Office*, 567 F.2d 9 (D.C.Cir.1976), in which the court struck down rules designed to solve a problem which did not exist. Quite to the contrary, the history of the rules reveals enormous benefits which will diminish or disappear if the rules are eliminated. Therefore, the rules are neither pointless or unjustified, and petitioners' premise is demonstrably invalid.

VII. CONCLUSION

No valid basis has been suggested for further proceedings involving the Prime Time Access Rule. Therefore, INTV urges the Commission to dismiss each of the pending petitions and let the public enjoy the benefits of the Prime Time Access Rule.

Respectfully submitted,



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